United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

147 (July 1953)

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

4-24-74

APPEAL FROM: EASTERN DISTRICT

CASE NO. 74 1156

TITLE OF CASE	ATTORNEYS FOR APPELLEE
UNITED STATES OF AMERICA, Plaintiff-Appellee V. FRANCIS D. LOVELL, a/k/a FRANK PETRONE, Defendant-Appellant	Edward John Boyd U.S. Attorney U.S. District Court Eastern District of New York 225 Cadman Plaza East Brooklyn, N.Y. 11201
	ATTORNEYS FOR APPELLANT
FP 1023	~~Simon Chrein, Esq. (Apointed)~~ Legal Aid Society ~~26 Court Street~~ ~~Brooklyn, N.Y.~~ ~~(522-3494)~~ Services Appeals Office U.S. Court House Room 606 New York, N.Y. 10007

NO. BELOW:	73 Cr ~~867~~ 857
JUDGE BELOW:	WEINSTEIN
DATE OF JUDGMENT:	2-1-74
NOTICE OF APPEAL FILED:	2-1-74

DATE	ACCOUNT OF APPELLANT	Received	Disbursed	REMARKS

PAGINATION AS IN ORIGINAL COPY

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

CASE NO. 74 1155	U.S.A. V. FRANCIS D. LOVELL

DATE	FILINGS—PROCEEDINGS	Filed
2-5-74	Filed copy of notice of appeal and docket entries	
2-5-74	Filed Form A	
2-7-74	Filed order: continuing Legal Aid Society counsel for appellant: record by 2-21-74; removal of record; 7 xerox copies appellant's brief & appendix by 3-21-74 w/dismissal in default; U.S. brief and appendix if any by 4-19-74; argument week of 4-29-74	
2-21-74	Filed record (original papers of district court)	
3-21-74	Filed brief, appellant w/pfs (7 copies) (Anders brief)	
3-21-74	Filed appendix, appellant w/pfs (7 copies)	
3-21-74	Filed motion to be relieved as appointed counsel w/pfs	
3-25-74	Filed copy of notice of appeal	
3-27-74	Filed motion to dismiss, with proof of service	
4-18-74	Filed order that appellant Lovell file briefs in their present form	
4-18-74	Filed 4 copies brief, appellant pro se	
4-18-74	Filed supplemental record (original papers of district court)	
4-29-74	Filed order granting leave to file appellee's brief today	
4-29-74	Filed brief,appellee w/pfs	
4-29-74	Filed order granting motion to be relieved as appointed counsel	
4-29-74	Action Submitted (by: Waterman,Friendly,Mulligan)	
4-29-74	Affirmed in Open Court	
4-29-74	Filed judgment (dismissing appeal for frivolousness, affirming judgment of District Court)	
4-29-74	Filed order granting motion to be relieved as counsel under CJA	
6-26-74	Issued certified copy of order dismissing appeal	
9-18-74	Original and supplemental record returned to district court	
10-1-74	Filed receipt of return of original & supplemental record to District Court	

74-1156

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

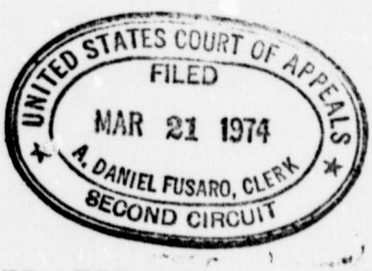
FRANCIS LOVELL,

Appellant.

Docket No. 74-1156

BRIEF FOR APPELLANT
Pursuant to
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
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WILLIAM EPSTEIN
Of Counsel

Table of Contents

Table of Cases

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- FRANCIS LOVELL, Appellant.	:	Docket No. 74-1156

BRIEF FOR APPELLANT
Pursuant to
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether there are any non-frivolous issues for appeal.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York

(the Honorable Jack B. Weinstein) rendered on February 1, 1974, after a trial without a jury, convicting Francis Lovell of transportation of a firearm in interstate commerce, appellant having previously been convicted of a felony, in violation of 18 U.S.C. §922(g), and of unlawful possession of an unregistered firearm, in violation of 26 U.S.C. §5861(d).

Appellant was sentenced to imprisonment for five years on each count, the sentences to run concurrently .

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged in a four-count indictment with various possessory offenses in connection with four different firearms. Count one charged possession of a pistol seized from appellant's person. Counts two and three charged possession of two pistols seized from appellant's suitcases after his arrest for possession of the first pistol. Count four charged possession of a shotgun later seized from appellant's car.*

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*Appellant was tried and convicted on counts one and four. The Judge reserved decision on defense counsel's motion to dismiss counts two and three, pending the termination of this appeal.

Prior to trial, defense counsel made a motion to surpress the weapons seized from appellant on the ground that the frisk that yielded the first pistol was unreasonable. Counsel also informed Judge Weinstein that he and the Assistant United States Attorney had agreed that, should the Judge deny the motion, the issue of guilt on counts one and four would be submitted for determination to the Court on the evidence introduced at the suppression hearing with some additional, stipulated facts (3-4*).

At the suppression hearing, two F.B.I. agents, Edward Holiday and Francis Jules testified, as did appellant.

Holiday testified that on September 15, 1973, acting on information received from the Boston F.B.I. office, he led a surveillance team to the Skyway Hotel, Queens. There, Richard Cepulonis, who was wanted for unlawful flight and for whom a warrant had been issued from the District of Massachusetts, was supposedly hiding in Room 125 (13). His information was

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*Numbers in parenthesis refer to pages of the suppression hearing and trial.

The stipulated evidence was as follows: that appellant was also known as Frank Petrone; that appellant had transported the weapons in interstate commerce; that appellant was convicted of larceny in Worcester (Massachusetts) Superior Court in 1970; and that the shotgun was not registered pursuant to the National Firearm Registration and Transfer Record Act (8-10).

that Cepulonis was accompanied by a close associate, appellant (14). Cepulonis was a suspect in several Massachusetts bank robberies, was known to be dangerous, and was believed to be in possession of several weapons, including an M-16 rifle (14). In addition, Cepulonis had escaped from a Massachusetts state institution where he was serving a lengthy sentence for robbery (15).

Holiday related that his information was that appellant was a close associate of Cepulonis, that he was a suspect in the same bank robberies, that he was a convicted felon, that he was known to be dangerous and that he was believed to be in possession of several weapons (15).

The F.B.I. surveillance team arrived at the hotel at about 3:00 a.m. (17). Holiday soon determined that appellant was the registered occupant of Room 125, that appellant's car was parked in the lot, and that at least one other person was believed to be occupying the room (15-17). At 8:00 a.m. the fifteen agents took up surveillance positions around the area, including five or six agents who gained access to the rooms on either side of Room 125 (18).

Holiday next related that at 12:10 p.m. a man carrying two suitcases, and a woman also carrying luggage, exited Room 125(18). Holiday immediately recognized the man

as appellant (18). At that point, Holiday and several other agents, one of whom was carrying a shotgun, approached appellant to question him about Cepulonis (18-19). Holiday stated that because they believed appellant to be armed and dangerous, and because they feared that Cepulonis was hiding in the room, he approached appellant, identified himself, and immediately patted him down (19). The pat down yeilded from under appellant's belt, a loaded automatic pistol, for which appellant was promptly arrested (19-20). A search of the suitcases resulted in the discovery of a loaded automatic pistol in each (20).

Following the arrest, Holiday advised appellant of his Fifth Amendment rights, then proceeded to question him about Cepulonis (23). Appellant gave no information about Cepulonis, and the latter was not found to be present in the room (24). At a later interview, appellant claimed that the guns were his legally, and that he needed them for protection against muggers (27-28). Although appellant would not divulge Cepulonis' whereabouts, a piece of paper found in his possession led the agents to apprehend Cepulonis in a Manhattan hotel (72).

Agent Jule's testimony was that at 12:15 p.m., five minutes after appellant's arrest, he observed the shotgun in

a paper bag in plain view on the floor in front of the driver's seat of appellant's car (32-33).

Appellant testified that the pistol found in the waistband of his trousers was not discovered during the pat down in the corridor, but later in another room when he was already handcuffed (79-80).

After considering the evidence and listening to argument, Judge Weinstein denied the motion on the grounds that the government's evidence demonstrated that the initial pat down was justified for the protection of the officers and that the shotgun was seized after being discovered in plain view (89).

The government and defense counsel then rested, and the Judge found appellant guilty on counts one (the waistband pistol) and four (the shotgun) (96-97).

Statement of Possible Legal Issues

The only possible issue on appeal is whether the pat down of appellant that yielded the automatic pistol was justified under Terry v. Ohio, 392 U.S. 1 (1968).*

The evidence established that the F.B.I. agents

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*If the pistol seizure was justified, so then was the plain view seizure of the shotgun that followed upon the arrest.

believed appellant and Cepulonis were hiding in the hotel room. Both were known to be dangerous and believed to be armed. When appellant emerged from the room, the agents sought to question him about Cepulonis' whereabouts, but first they wished to protect themselves from danger by patting him down. This procedure was reasonable under Terry v. Ohio, supra:

> When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.
>
> Id., 392 U.S. at 24.

See also Adams v. Williams, 407 U.S. 143 (1972); United States v. Riggs, 474 F.2d 699 (2d Cir. 1973).

In summation, the pat down of appellant was a minimum intrusion on his privacy specifically for the purpose of protecting the agents against harm.

CONCLUSION

AN ORDER SHOULD BE GRANTED PERMITTING WILLIAM J. GALLAGHER, ESQ., THE LEGAL AID SOCIETY, TO WITHDRAW AS ASSIGNED COUNSEL FOR APPELLANT.

Respectfully submitted,

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Federal Defender Services Unit
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New York, New York 10007

WILLIAM EPSTEIN
Of Counsel

Certificate of Service

March 31, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

William Epstein

74-1156

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

FRANCIS LOVELL,

Appellant.

Docket No. 74-1156

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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WILLIAM EPSTEIN
Of Counsel

CRIMINAL DOCKET

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.
[illegible] v/s Firearm Action	
	For Defendant:
Did transport and possess a firearm, etc.	

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED			
			DATE	NAME	RECEIVED	
Fine,			9-1-74	Notice of appeal(NO FEE)		
Clerk,						
Marshal,						
Attorney,						
Commissioner's Court,						
Witnesses,						

DATE	PROCEEDINGS
9-20-73	Before Weinstein J - Indictment filed.
9/28/73	Before BARTELS, J.- Case called= Deft and counsel present-Deft enters a plea of not guilty-Trial set down for ~~12/17/73~~ 10/2/73
10/1/73	Notice of readiness for trial filed
10-4-73	Magistrate's file 73 M 1390 inserted into CR file.
10-11-73	Notice of Motion filed for suppressing evidence (ret. Oct. 31, 1973)
10-29-73	Before WEINSTEIN J - Case called - deft & counsel Simon Chrein of Legal Aid present - defts motion to suppress - hearing ordered & begun. Govt rests - Deft rests - hearing concluded - defts motion to suppress is denied as to counts 1 and 4 and reserved as to counts 2 and 3 - Jury waived by deft - Trial ordered and BEGUN. Stipulated the above record become part of trial - trial concluded - defts motion for Judgment of Acquittal is denied - court finds the deft

POOR COPY

	PROCEEDINGS	CLERK'S FEES
		PLAINTIFF
	[illegible]	
[illegible]	Letter filed received from deft LOVELL(for request of transcript of trial etc. (forwarded to Judge Weinstein)	
[illegible]-73	Letter with reply to deft received from Chambers (for return of $300 seized from the deft etc)	
	[illegible] dated Dec 29, 1973.	
13-73	Letter from defendant Lovell filed received from Chambers (for return of items seized, etc.)	
[illegible]-74	Letter unlated from deft LOVELL filed received from Chambers and reply from Judge Weinstein to deft dated Jan. 15, 1974.	
[illegible]-74	Motion for return of seized property etc. (forwarded to J. WEINSTEIN.	
[illegible].74	By WEINSTEIN J - Memorandum and Order filed on motion for return of seized property - Deft is presently awaiting sentence. At the [illegible] of sentence the Govt will be prepared to explain why the defts property has not been returned. Clerk to send copy of this Memorandum and Order to the deft., his counsel and to the USA(copies sent as directed.)	
74	Letter of Jan. 27, 1974 filed from deft (forwarded to Weinstein, J)	
[illegible]	Before WEINSTEIN,J.- Case called- Deft and counsel present- Deft [illegible] to imprisonment for a period of 5 years on each of counts [illegible] concurrently- Clerk to file notice of appeal in forma pauperis [illegible] at this time counts 2 and 3 remain open)	
	Judgment and Commitment filed- certified copies to Marshal	
	Notice of appeal filed	
	Docket entries and duplicate of notice of appeal mailed to C of A	
	Letter from deft dated 2-1-74 and reply of Pro Se Clerk filed	
74	Certified copy of Judgment & Commitment retd and filed - Deft. del. to Federal Det. Headquarters.	
	Order received from Court of Appeals and filed that record be docketed on or before 2-21-74	
	Stenographer's transcript of 10/29/74 filed.	
-74	Letter dated 2-8-74 received from Chambers filed., from deft [illegible] for copy of Indictment. Clerk to furnish same to the deft. So Ordered by Judge Weinstein (see entry on face of letter on 2-[illegible]-74)	
74	Letter dated 2-13-74 filed from Asst Kaplan received from Chambers with Parole Report attached. (endorsed on bottom of letter as having no recommendation and signed by Judge Weinsten. Copy of	

Original
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

73 CR 857

- X

UNITED STATES OF AMERICA

INDICTMENT

- against -

Cr. No. _____
(T.18, U.S.C.§922(g) and T.26, U.S.C.§5861(d))

FRANCIS D. LOVELL, a/k/a "Frank Petrone",

Defendant.

- X

THE GRAND JURY CHARGES:

COUNT I

On or about the 15th day of September, 1973, within the Eastern District of New York, the defendant FRANCIS D. LOVELL, a/k/a "Frank Petrone", having been convicted on February 13, 1970 of larceny at Worcester Superior Court, Worcester, Massachusetts, a crime punishable by imprisonment for a term exceeding one year, did knowingly ship and transport a firearm, that is, a caliber .25 automatic pistol, serial number 021253, in interstate commerce from Cleveland, Ohio to Queens, New York. (T. 18, United States Code, Section 922(g)).

COUNT II

On or about the 15th day of September, 1973, within the Eastern District of New York, the defendant FRANCIS D. LOVELL, a/k/a "Frank Petrone", having been convicted on February 13, 1970 of larceny at Worcester Superior Court, Worcester, Massachusetts, a crime punishable by imprisonment for a term exceeding one year, did knowingly ship and transport a firearm, that is, a caliber [illegible] automatic pistol, serial number 1255046, in interstate commerce from Cleveland, Ohio to Queens, New York. (Title 18, United States Code, Section 922(g))

COUNT III

On or about the 15th day of September, 1973, within the Eastern District of New York, the defendant FRANCIS D. LOVELL, a/k/a "Frank Petrone", having been convicted on February 13, 1970 of larceny at Worcester Superior Court, Worcester, Massachusetts, a crime punishable by imprisonment for a term exceeding one year, did knowingly ship and transport a firearm, that is, a caliber 9mm-380 automatic pistol, serial number 1191100, in interstate commerce from Cleveland, Ohio to Queens, New York. (Title 18, United States Code, Section 922(g)).

COUNT IV

On or about the 15th day of September, 1973, within the Eastern District of New York, the defendant FRANCIS D. LOVELL, a/k/a "Frank Petrone", knowingly and unlawfully possessed a firearm, to wit: a twelve (12) gauge shotgun, serial number 331543, having a barrel length of approximately seven inches, which firearm was not registered to him in the National Firearm Registration and Transfer Record as required by Chapter 53, Title 26, United States Code. (Title 26, United States Code, Section 5861(d)).

A TRUE BILL.

Foreman.

Robert A. Morse/RK

UNITED STATES ATTORNEY

I have no further questions, your Honor.

THE COURT: Accordingly I find the defendant guilty beyond a reasonable doubt of count four.

MR. CHREIN: In view of the fact that this is not a jury verdict no motion will be made to set aside the verdict.

THE COURT: All right, do you want a probation report?

MR. CHREIN: I believe -- I believe that in a case of this gravity one should be had.

THE COURT: All right. The defendant is now in custody, is he?

MR. CHREIN: He is in custody, your Honor.

THE COURT: Is there any application for bail?

MR. CHREIN: Well, your Honor, I have-- I have a number of applications.

Your Honor has heard the sum and substance of the case against the defendant. The defendant is being held in lieu of $50,000 bail. I would submit that this sum, in view of the nature of the -- of the crime he's charged with -- he's not charged with a crime of violence per se, he's

were completely inaccessible to him. And I would submit that all these items are suppressible.

THE COURT: First I credit the evidence of the two FBI agents that the defendant was patted down and searched in the corridore immediately upon his being apprehended. I do not believe the testimony of the defendant that he was searched in the room. It's hard for me to believe that the FBI agents would have missed a gun like this on the first pat-down in the corridore.

It would be one of the things they would look for almost immediately. So I find that he was searched there and that they did find the gun in the waistband, Government Exhibit 1 referred to in Court 1 is the result of that pat-down. I find that the pat-down was perfectly reasonable under the circumstances: They were staked out expecting to find a man who was a fugitive, for whom they did have a warrant and who was believed with justification to be extremely dangerous. Since this defendant was coming out of the hotel room they believed was occupied, with justification I believe, by Sepalonis, I believe that questioning him was

appropriate and the pat-down under Perry was clearly appropriate.

MR. CHREIN: Your Honor, I hate to interrupt the Court, but I would say there was no reasonable basis for belief that Sepalonis was in the Courtroom. The basis for the agents' belief was not that provided by a known informant or by any independent informer. They had communication from Boston.

THE COURT: Well, they certainly did get -- didn't have enough to get a warrant to search for that reason they were well advised to stay out of the room, but they certainly had enough to be apprehensive about Sepalonis being in that room. He was known to be in New York and in fact it turned out that he was in one of the other Holiday Inns with his car nearby, so it does seem to me that they were right in being apprehensive about this.

And the fact that they were staked out indicated they had some belief in good faith that he was in that room. I believe coming out of the room this way there was ample grounds to stop and question this witness.

Now, that means that the suppression

motion as to Government one must be rejected.

Now, to get to Government 4, which is the next count, I believe that the Government was wrong in not having that evidence there. This is the second time within the space of one month where the Government has not produced a bag containing evidence. The last occasion was a bag containing narcotics, a paper bag where -- was this tried by you?

MR. CHREIN: It was tried by Miss Seltzer of my office.

THE COURT: By Miss Seltzer, involving a Panamian or former Panamian citizen coming off the aircraft at Kennedy, and the nature of the bag and the way it was -- the narcotics was wrapped, was relevant to the issue before us, namely the knowledge of the defendant and the accuracy of the story that was told. This is the kind of sloppy investigation I have working that I have not seen before by the FBI. The other case involved the Customs --

MR. CHREIN: The Customs Service. It was the Customs Service.

THE COURT: -- Customs, as I recall. I

don't understand why the FBI allows evidence like this to have been lost. This is the first time I have ever heard of that. And it seems to me that the FBI ought to take care to keep these things as it almost always does. I am really shocked by the failure to know whether this piece of evidence is, particular since it bears on the issue. I find that the Government is guilty of spoiliation with respect to this piece of evidence. Nevertheless, all things being considered, I cannot find what the witness for the FBI has deliberately lied to me about what he saw since we have a confirmation of what he said by another witness, and I credit his testimony that he saw the gun when he looked into the window of the car. Having seen the gun and there being an apparent violation of the law with a sawed-off shotgun, in view of the circumstances, I think it was right for the Government agent to use the keys which had been properly obtained from the defendant in light of the search made while he was being properly arrested to open the car and seize the gun. I think that's particularly important in this case, because they didn't

THE COURT: Denied.

MR. CHREIN: The defendant rests. The defendant would make the same motion at the end of the entire case.

THE COURT: Denied.

As to count 1, I find the defendant guilty beyond a reasonable doubt. I find that the defendant before me was also known as Frank Petrone, that he was convicted on February 13th, 1970 of larceny in Massachusetts, of a crime punishable by imprisonment for a term exceeding one year. I find that he did knowingly and wilfully ship and transport a firearm, that is caliber .25 automatic pistol, serial number 021253, in interstate commerce from Cleveland, Ohio to Queens, New York. I find that this was done in violation of Section 922G of Title 18 of the United States Code.

Is there any other finding you wish me to make in connection with count one?

MR. KAPLAN: No, there is not.

MR. CHREIN: No, your Honor.

THE COURT: The defendant is guilty of count 1 beyond a reasonable doubt.

As to count four I find that on or about the 15th day of September 1973 beyond a reasonable doubt, the defendant Francis D. Lovell knowingly and unlawfully possessed a firearm, to wit, a 12 guage shotgun, serial number 381543, having a barrel length of approximately seven inches, which firearm was not registered to him in the National Firearm Registration and transfer record as required by Chapter 53 Title 26 United States Code. This constitutes a finding beyond a reasonable doubt on the facts and on the law aw well. Is there any other finding you wish me to make in connection with count four?

MR. KAPLAN: That the possession was within the Eastern District of New York.

THE COURT : Thepossession was within the Eastern District of New York, to wit, at the Holiday Inn near LaGuardia Airport.

MR. KAPLAN: Skyway Motel.

THE COURT: Skyway Motel there, yes.

MR. CHREIN: That's at LaGuardia.

MR. KAPLAN: Yes, that's at LaGuardia.

THE COURT: Yes, it was right near LaGuardia. Skyway.

MR. CHREIN: Not the first case I have had.

I have no further questions, your Honor.

THE COURT: Accordingly I find the defendant guilty beyond a reasonable doubt of count four.

MR. CHREIN: In view of the fact that this is not a jury verdict no motion will be made to set aside the verdict.

THE COURT: All right, do you want a probation report?

MR. CHREIN: I believe -- I believe that in a case of this gravity one should be had.

THE COURT: All right. The defendant is now in custody, is he?

MR. CHREIN: He is in custody, your Honor.

THE COURT: Is there any application for bail?

MR. CHREIN: Well, your Honor, I have-- I have a number of applications.

Your Honor has heard the sum and substance of the case against the defendant. The defendant is being held in lieu of $50,000 bail. I would submit that this sum, in view of the nature of the -- of the crime he's charged with -- he's not charged with a crime of violence per se, he's

Certificate of Service

March 21, 1974

I certify that a copy of this brief and appendix has been mailed to the Acting United States Attorney for the Eastern District of New York.

William Epstein

Original - Redacted
2 Marking

74-1156

To be argued by
KENNETH J. KAPLAN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,

Appellee,

- against -

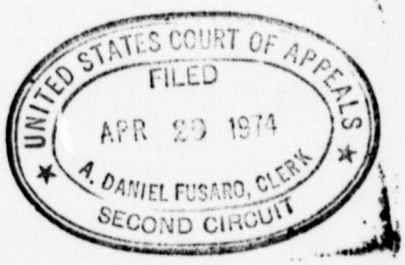
DOCKET NO. 74-1156

FRANCIS LOVELL,

Appellant.

- X

BRIEF FOR THE APPELLEE



EDWARD JOHN BOYD V
United States Attorney,
Eastern District of New York

RAYMOND J. DEARIE,
KENNETH J. KAPLAN,
Assistant United States Attorneys,
Of Counsel.

74-1156

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,

Appellee,

- against -

FRANCIS LOVELL,

Appellant.

- X

PRELIMINARY STATEMENT

Appellant Francis Lovell appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.), entered on February 1, 1974, after a non-jury trial, which judgment convicted appellant of the transportation of a firearm in interstate commerce in violation of Title 18, United States Code, Section 922(g) (Count One*) and the unlawful possession of an unregistered firearm in violation of Title 26, United States Code, Section 5861(d) (Count Four).

Appellant was charged in a four-count indictment with various possessory offenses in connection with four different firearms. Counts Two and Three charged the possession of two

*Appellant was previously convicted of a felony.

pistols seized from appellant's suitcase at the time of his arrest for the possession of a pistol charged in Count One. Count Four charged possession of a shotgun seized from appellant's car. Appellant was sentenced to concurrent terms of five years imprisonment on Counts One through Four. On this appeal, the Legal Aid Society has filed with this Court a brief pursuant to Anders v. California. The Government has cross-moved to dismiss the appeal and appellant has himself filed a pro se brief on appeal. Appellant claims, inter alia, that the pistol seized from his person (Count One) and the shotgun seized from his car (Count Four) were erroneously received in evidence in violation of his Fourth Amendment rights.

STATEMENT OF THE CASE

Prior to trial defense counsel moved to suppress any oral statements made by appellant, as well as material seized from his automobile, person or motel room at the time of his arrest. Judge Weinstein was informed by defense counsel that he and the Government had agreed that, should the Judge deny the motion to suppress, the issue of guilt on counts one and four would be submitted to the Court on the evidence introduced at the suppression hearing with additional stipulated facts (3-4).*

Two F.B.I. agents, Edward Holiday and Francis Jules, testified at the suppression hearing, as did appellant. Agent Holiday testified that on September 15, 1973, he and his fellow agents, acting on information from the Boston Division of the F.B.I.,began a surveillance of the Skyway Motel, Queens. The information received from Boston indicated that Richard Cepulonis, for whom an unlawful flight warrant had been issued, accompanied by appellant, Francis Lovell, were occupying Room 125 (13-14). Cepulonis was a suspect in several Massachusetts bank robberies, was known to be a "very dangerous individual" and was believed to be in possession of weapons including M-16 rifles (14). The

*The stipulated facts were as follows: 1) that appellant was also known as Frank Petrone; 2) that appellant had transported the weapons in interstate commerce; 3) that appellant was convicted of larceny in Worcester, Massachusetts Superior Court in 1970 and 4) that the shotgun seized from appellant was not registered pursuant to the National Firearm Registration and Transfer Act (8-10).

agents were aware that Cepulonis was an escapee from a Massachusetts state prison where he was serving a lengthy sentence for robbery (15).

Agent Holiday's information also concerned appellant Lovell. He was known to be a very close associate of Cepulonis, was a suspect in the same bank robberies in Massachusetts, and was a "very, very dangerous individual, a convicted felon and also in possession of the M-16 rifles and other hand weapons..."(15).

Surveillance at the Skyway began at 3:00 A.M. (15, 17). Agents quickly determined that appellant was registered in Room 125, that appellant's car, a yellow 1969 Mercury with Ohio plates, was parked in the lot and that at least one other person was believed to be occupying the room. At approximately 9:00 A.M., the agents gained access to the two rooms adjacent to Room 125 (17-19).

Around 12:10 P.M. a man and woman, both carrying luggage, exited Room 125. Holiday immediately recognized appellant (18). He testified to the agents' concern for the safety of everyone present, in addition to their fear that Cepulonis, a dangerous fugitive, was still in the room. As appellant Lovell started to walk toward them, the agents approached him, identified themselves and, believing appellant to be armed and dangerous, patted him down (19). The pat-down yielded a loaded .25 caliber pistol. Appellant was then arrested (19-20). A search of the suitcases disclosed a loaded automatic pistol in each (20).

Appellant was advised of his Fifth Amendment rights and then questioned about Cepulonis (23-4). Although divulging nothing

about Cepulonis' whereabouts, appellant's personal affects included a piece of paper reflecting on one side the address of the Skyway Hotel and on the other side the address of the Holiday Inn where Cepulonis was ultimately apprehended (72). Also seized from his person were the keys and the Ohio registration for the 1969 yellow Mercury which appellant freely admitted belonged to him. A search of Room 125 revealed nothing (66). At a later interview, appellant volunteered that the guns were his legally and that they were necessary for his protection from muggers (28).

Agent Jules testified that a sawed-off shotgun was observed on the floor of the 1969 yellow Mercury five minutes after appellant's arrest (32-3). Seen through the closed windows of the car, the shotgun was in plain view, protruding from a brown paper bag with two shells visible in the chamber (33-4). The door of the automobile was unlocked with the keys found on appellant and the shotgun was seized (34, 36).

Appellant testified that the pistol found on his person was not discovered during the pat-down, but later in a motel room after he was handcuffed (79-80).

Judge Weinstein denied the motion on the grounds that the Government's evidence demonstrated that the initial pat-down was justified for the protection of the officers and that the shotgun was seized after being discovered in plain view.

The Government and defense counsel rested and the Judge found appellant guilty on counts one and four (97).

ARGUMENT

(1)

The Pat-down Which Revealed an Illegally Possessed Pistol Was a Reasonable Search for Weapons by Agents Who Had Reason to Believe They Were Dealing with Armed and Dangerous Fugitive.

The pat-down of the appellant which yielded the pistol in his waistband adequately satisfies the applicable standard for "stop and frisk" situations set out in Terry v. Ohio, 392 U.S. 1 (1968).

> When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. 392 U.S. at 24.

The evidence established that the arresting agents had reason to believe Cepulonis and appellant were hiding in Room 125. Both were known to be dangerous and believed to be armed. Although the intent of the agents was to question appellant about Cepulonis, they took appropriate precautions to protect themselves by performing a routine frisk. Such actions are clearly within the Terry standard previously set out. Under less compelling circumstances, the Terry court held admissible two revolvers and a number of bullets seized after an officer observed a suspicious pattern of movement on the part of two men whom he had never seen before.

The search of appellant resulting in the seizure of the pistol was a minimal intrusion on his privacy conducted for the specific purpose of allaying agents' reasonable fear for their safety. See also Adams v. Williams, 407 U.S. 143 (1972); United States v. Riggs, 474 F.2d 699 (2d Cir. 1973).

(2)

In his pro se brief appellant presents an array of arguments which he claims require a new trial. In addition to challenging Judge Weinstein's denial of the motion to suppress the pistol uncovered in the search of his person at the time of his arrest, appellant also challenges the seizure of a shotgun in the front seat of his automobile. Judge Weinstein permitted the introduction of the shotgun having found that the weapon appeared in plain view at the time of appellant's arrest. Appellant's argument is best answered by Judge Weinstein's conclusion:

> Having seen the gun and there being an apparant violation of the law with a sawed-off shotgun, in view of the circumstances, I think it was right for the Government agent to use the keys which had been properly obtained from the defendant in light of the search made while he was being properly arrested to open the car and seize the gun. I think that's particularly important in this case, because they didn't know where Cepulonis was. He could have come on the scene at any time and he might himself have had keys to the car, and might have grabbed this gun and caused considerable danger, so that it was important to take all those weapons and see that they were suitably cared for.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: Brooklyn, New York
April 26, 1974

EDWARD JOHN BOYD V
United States Attorney
Eastern District of New York

RAYMOND J. DEARIE,
KENNETH J. KAPLAN,
Assistant United States Attorneys,
Of Counsel.

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 26th day of April, 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Frank David Lovell
Pro se
Custody of U. S. Marshals
Boston, Massachusetts

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defenders Services Unit
606 United States Court House
~~Foley Square, New York, N. Y.~~ 10007

Sworn to before me this
26th day of April, 1974

Juanita Mayo

JUANITA MAYO
Notary Public, State of New York
No. 24-4501911
Qualified in Kings County
Commission Expires March 30, 1975

Deborah J. Amundsen

DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____
_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355

74-1156

B

FRANK DAVID LOVELL
CUSTODY U.S.MARSHALS
BOSTON,MASSACHUSETTS.

UNITED STATES COURT OF APPEALS
FOR THE SECOUND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-against-

FRANCIS DAVID LOVELL,
Appellant,

MOTION OF APPEAL

D.C. CRIMINAL NO. 73 cr 857

NAME OF APPELLANT: FRANK DAVID LOVELL Pro-se

NAME AND ADRESS OF APPELLANT ATTORNEY: FRANK DAVID LOVELL Pro-se
CUSTODY U.S. MARSHALS
BOSTON, MASSACHUSETTS.

OFFENSE: VIOLATION OF TITLE 18 U.S.C. 922 (g).
VIOLATION OF TITLE 26 U.S.C. 5861 (d).

ON FEBRUARY 1,1974, APPELLANT WENT BEFORE JUDGE JACK WEINSTEIN AND RECIEVED A SENTENCE OF FIVE YEARS FOR THE ABOVE STATED CHARGES. AT THIS TIME I AM CONFINED AT THE F.C.I. DANBURY BUT HAVE REASON TO BELIEVE I WILL BE REMOVED FROM HERE SHORTLY, I THE ABOVE NAMED APPELLANT, HEREBY APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOUND CIRCUIT FROM THE ABOVE STATED JUDGEMENT.

Frank D Lovell
FRANK DAVID LOVELL Pro-se

Now, comes Appellant Frank David Lovell who prays to move this court to grant him the below of which he seeks:

1. The Appellant wishes to inform this court his place of arrest was a motel in the Eastern District of New York known as the Skyway Motel. On the night of Sept 14,1973 the appellant called a one Mary Cosgrove appellants girlfriend of whom resides on the outskirts of Bostor Massachusetts. At this time appellant asked girlfriend to meet him at the Laquardia airport in New York to spend a couple of days in the city. At around 10:50 p.m. appellant went to said airport picked up girlfriend and then drove to said motel where appellant had rented a room earlier that evening that room being no. 125 "It was later learned from agent Holiday appellant was under obversatition from around 12:00 midnight to 12:00 noon the next day" (4th amendment violated when agent might have reasonably obtained a warrant but failed to do so.) Rabinowitz,339 U.S. 56 (50) which says" the revelant test is not whether it is reasonable to produce a search warrant, but whether the search was reasonable".. also see...Coolidge 403 US 443, 91 Sc 2022, 29 LE 2 564 (71) and Chimel 395 U.S. 752, 89 Sc 2034, 23 LE 2 685 (69). Indiana L.J. 257, 262 (71) Use of seaech warrants can best be encouraged by making it administratively feesiable to obtain a warrant when one is needed,It is a cardinal rule that, in seizing goods and articals law enforcement agents MUST secure and use search warrants whenever reasonably practical...This role rest upon desirebility of having magistrates rather than the law officers determine when searches and seizures are permissable and what limitations should be placed upon such activities.Trupiano v. United States 334 U.S. 699, 705 (1948) quoted with approval in Chimel v. California,395, U.S. 752, 758, (1969). In the morning hours around 11:30 the phone in room 125 rang, appellant answered and was asked what time he was checking out appellant stated at 12:00 noon.

2. At noon appellant carrying two suitcases one in each hand left rm 125 and proceeded up hallway towards exit door with girlfriend beside him. At which time two men dressed in suits came by appellant and grabbed him causing appellant to drop said suitcases within the hallway"from this point on agents had full controll of these said suitcases" At no time during all this did anyone identify themselves to the appellant nor at any time was the appellant informed of any rights what so ever. There was no warning Perkins v. Henderson 418 F. 2d 441, 6 CLB 350 (1969)Imediatley after this appellant noticed numerous persons around him with shotguns and pistols pointed at him and his girlfriend still no one identified themselves to the appellant or to his girlfriend.

3. It was stated by agent Holiday at the trial that the appellant was wanted for NO crime, suspected of NO crime, and was not acting in a suspecious manner. Whiteley v. Warden, 91 S.Ct. 1031, 7 CLB 367 (1971) U.S.S.C. the probable cause standard for a warrantless arrest by police must be at least stringent as that required for the assurance of an arrest or search warrant by magistrate. Irwin v. Superior Court of L.A. County,462 P.2d 12, 6 CLB 230 (1969). A detention based on a mere hunch is unlawful, even though the agent may have acted in good faith...

But that appellant was merly wanted for questioning concerning the escaped prisoner of which they had a warrant to arrest.

4. At this time appellant was brought into the motel rm which the agents had spent the previous night about fifteen (15) feet from appellants rm. The same room agents came out of whem appellant was grabbed all this being done by force with agents holding on to the appellants arms very tightly. once within the room appellant was searched and handcuffed and thrown on the bed, at this time agents were bringing in the appellants suitcases and then proceeded to search them. At this time another agent came on to the bed in which appellant was lying face down with his hands handcuffed behind his back and sat on the appellants legs again searching the appellants person at this time agent found a small automatic located in appellants pants along his bach, appellant was wearing sport coat with shirt which hung over pants. Rabinowitz, 339 U.S. 56 (50) (supra). Coolidge 403 us 443, 91 Sc 2022, 29 LE 2 564 (71). Chimel 395 U.S. 752, 89 Sc 2034, 23 LE 2 685 (69). United States v. Hostetter 295 F. Supp. 1312 (1969) D.C. Delaware. The officers CANNOT search the defendants belongings for weapons without reasonable cause. Irwin v. Superior Court of L.A. County 462 P.2d 12, 6 CLB 230 (1969) (supra) Bowman, 18 Ca 3 316, 95 cr 757 (71) Conflict whether officer saw automatic before seizing it from defendants pocket. Schoepflin, 391 F 2 390 (9 cir,) (68) Nikrash, 367 F 2 740 (7 cir,) (66). Moderacki, 280 F s 633 (68). Blalock, 255 Fs 268 (66.) Federal Circuit Courts require a pre-consent admonitition, the 9th Cir has held that Federal District Courts must release, unwarned convicts with no knowledge they could refuse consent to search. At no time did appellant give consent to search anything.

Without warrant, not in presence with no probable cause if the person has in fact committed a felony; but, a search incident to such a luck out arrest is still invalid if probable cause was lacking. Brown 45 C 2 640, 290 P 2 528 (55). Badillo 46 C 2 269, 294, P 2 23 (56) Curtis 70 C 2 347, 74 cr 713, 450 P 2 33 (69).

5. At this time agent Holiday stated appellant was under arrest, appellant asked to see warrants agent stated they had none, Appellant asked to make a phone call he was told later, appellant asked why he was under arrest agent stated violation of the firearms act. A Prima Facie case for the illegal warrantless search of anything is made as follows. Q. "Officer did you have a search warrant? " Ans. "No I didnt". the people now have to justify the search. Badillo, 46 C 2 269, 294 P 2 23 (56). Haven, 59 C2 713, 31 cr 47, 381 P 2 927 (63). P v Se (Kiefer),3 C 3 807, 91 cr 729, 478 P 2 449 (70). Indiana L.J. 257, 262 (1972) (supra). United States v. Hostetter, 295 F. Supp. 1312 (1969) D.C. Delaware. (supra). Brown, 45 C 2 640, 290 P2 528 (55) (supra). Curtis, 70 C2 347, 74 cr 713, 450 P 2 33 (69) (supra). Appellant was handcuffed from the time he entered agents motel room, always in the presence of at least five agents. During which time agents searched

appellants automible to obtain evidence which was in an estimate to be about sixty (60) feet away from the appellant outside the motel within the parking lot: Coolidge, 403 US 443, 91 Sc 2022, 29 LE 2 564 (71) Evidence must be inadvertently come upon and without unlawful intrusion, limitations: (a) a plair view alone never enough to justify a warrantless seizure of evidence; (b) Discovery must be inadvertent, if known in advance must get search warrant. Agents knew this automible was there and who it belonged to the night before appellants arrest, yet up to 12:00 noon did not secure any warrants of any type. If evidence was seen that night which it must have been then warrants should have been gotten .

6. Appellant was then led from agents motel room to the exit door leading to the parking lot as appellant was passing his automoble he noticed the air gone from the tires of his car when agents were asked about this they stated that was done so that appellant could not escape them, there were also agents with rifles stationed within the parking lot . Appellant would like the court to note taht all this time while within the motel room agents were asking appellant questions without the presence of an attorney, before leaving the motel room agents finally stated to the appellant(we are federal agents you are under arrest stated by agent Holiday. Appellant was then brought to the Federal Bldg in New York City Where he was again then questioned, appellant then again asked to make a call to an attorney, again he was told later, The appellant asked to speak with his girlfriend this was also denied at no time was the appellant allowed to get near his girlfriend nor to speak with her. The appellant at no time was informed of his Constitutional rights, the appellant at no time was informed of his right to remain silent, the appellant at no time was given the Miranda warnings. The appellant was in fact detained within the Federal Bldg for a period of six hours all this time being questioned. The time of appellants arrest and the time of the arrival in the Federal Detention Headquarters will back this up. Orzoco v. Texas, 394 U.S. 324 Miranda warnings were not stated by the agents when I was formally arrested which was a violation of the appellants Constitutional rights , agents were in fact to busy asking appellant questions about a one Richard Cepulonis that the rights were never given. Lathers v. United States, 396 F.2d 524, 4 CIB 416. Miranda requirement that an accused "has the right to the presence of an attorney" (during any Questioning)and that if he cannot afford one an attorney will be appointed for him prior to any questioning if he so desires. I DID SO DESIRE!!!

7. The appellant would like to make known at the time of his arraingment U.S. Attorney K.Kaplin stated to the Magistrate that the appellant was scouring the countryside robbing banks John Dillinger Style therefore he requested an excessive bail be placed upon the appellant. Because of this appellant was placed on an unreasonable bail of $50.000 thousand cash bail.

There was no evidence nor suspicions to allow, this man to make such a statement to the magistrate, please see enclosed paper for this mans attitude towards the appellant during his confinement while within New York going to trial. UNREASONABLE BAIL: People v. Terrell, 309 N.Y.S. 2d 776, 6 CLB 409 (1970). **a case where a defendant charged with murder would be granted bail to the amount of $10.000. Klien v. Kruger, 307, N.Y.S. 2d 207, 6 CLB 355 (1969). The appellant wished this court to also examine the possiabilties of prejiduce within this case. Enclosed you will find a statement which I had hoped to read to Judge Weinstien before my sentencing, but was advised against it by my legal aid attorney Mr. Klien this should bring to light things which happened to the appellant while this trial was in progress.

8. As the transcript will show Attorney Klien asked agent Holiday to this effect: Ques: Agent was the defendant wanted by any city, state, or federal agency concerning a criminal act? Ans: No. Ques: was the defendant under any sort of investigation? Ans: No. Ques: was the defendant acting in a suspecious manner? Ans: no. Ques: "officer did you have a warrant to arrest or search the defendant? Ans: No, we just wanted to talk with him". Whiteley v. Warden, 91 S, Ct. 1031, 7 CIB 367 (1971). U.S.S.C. (supra) United States v. Hostetter, 295 F.Supp. 1312 (1969) District Court Delaware. (supra) Irwin v. Superiou Court of L.A. County 462 P.2d 12, 6 CIB 230 (1969) (supra).

9. The appellant feels his rights, privileges, or imunities secured by the Constitution and existing laws were violated to the extreme. One of those being the 14 amendment concerning life, liberty, or property without due process of law, nor deny any person the equal protection of these laws. "Due Process" and "Equal Protection Clause". Also appellant feels the fourth (4th) amendment was also violated The right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
There was no reason to believe that appellant was dangerous for he has no violence on his record, nor has he a violent attitude.
Appellant also feels the eight (8th) amendment was also violated at the time of my seizure, "cruel and Unusal Punishment"** no punishment disproporate to the offense, for as the agents approached appellant no offense was in fact committed, therefore any actions after that would become cruel and unusal punishment, for there was in fact no offense being committed.

1

10. The appellant also feels that counsel for the defense was lacking many things were done without the appellants knowledge untill after the trial, in fact the appellant did not realize that he in fact was on trial appellant in fact thought he was there for a motion hearing and that all disscussions were for the pre-trial motions appellant was in fact tried without his knowledge. The appellant had witnesses for his trial, but did not inform then for appellant was waiting to see how the motion hearing went, that in fact come to find out was the applants complete trial. Appellants attorney stated that if appellant waived trial by jury the U.S. Attorney would in fact drop two of the charges which I agreed to, now come to find out these are only dropped pending termination of this appeal I feel a great many injustices were done during this so called trial. My court appointed attorney would never supply me with papers concerning this case he always stated after the trial, but appellant now realizes after the trial might be to late. The appellant can now understand why the scales of justice are in fact blindfolded.

Appellant would like this court to note that appellant had written to the Legal Aid Appeals over a month ago concerning his appeal but of the many letters appellant had sent he heard no response. Finally appellant made a phone call to Legal Aid Appeals and was told by a one Mr. Epstien that my appeal was in fact being drawn up, at this time appellant asked that a copy of this be sent to him upon completation. Appellant is not in possession of the so-called appeal of which the Legal Aid Appeals office has worked over a month and one half on, it states only three cases it in fact does not help the appellant at all and will have to be denied by the United States Court of Appeals of which I would not blame them at all. For this reason appellant wishes to file his own appeal at this time. Appellant is a layman of these existing laws and is completly lost in these proceedings therefore he wishes to file his own appeal whereas he would know that something has been sent to the United States Court Of appeals for the Secound Circuit, concerning this case.
The appellant feels that the Legal Aid Appeals has done him an injustice and prays for this court to relieve them from this case as soon as possiable., And in fact allow this document to enter the United States Court of Appeals for thr Secound Circuit in my behalf.

Appellant would also like to add that he is a layman of these existing laws, that as much as appellant had tried to recieve a transcript of his past trial to aid him in the application of this appeal that all his efforts were in fact denied, this therefore is made out without the aid of the transcript of appellants trial.

Appellant prays this court will in fact give this appeal their sincerest considerationn and the utmost in understanding.

UNITED STATES COURT OF APPEALS
FOR THE SECOUND CIRCUIT

UNITED STATES OF AMERICA,*
Appellee,*
*
-against-*
*
FRANCIS DAVID LOVELL,*
Appellant,*

AFFIDAVIT

D.C. CRIMINAL NO. 73 cr 857

I, Francis David Lovell, being duly sworn, desposes and says:

1. That the criminal record of the appellant does in fact contain no violence or threating crimes whatsoever.

2. That the appellant was confined from 1970 to 1973 within a state prison in the state of Massachusetts during which time appellant was placed on the outside farm program.

3. During the above mentioned time of confinement appellant was in fact given four (4) furloughs of which there were no inicident.

4. During this time of confinement appellant was in fact elected chairman of the Peaceful Movement Committee P.M.C: This committee being established to bring about progress in prisons within a peaceful manner and totaly being against violence in any form.

5. That the pre-sentence report of which was collected by the Eastern District court is based on mis-statements and outright lies, such as the report from the prison of which I was confined does in fact state appellant was addicted to Heroin during the months of December to May, please note appellant was in fact incarcerated during this time within the state prison at Concord ,Mass the chances of appellant being addicted to HEROIN during this period are in fact unbelievable, this is in fact impossiable and there can in no way be any sort of record to this effect medical, or other wise this in fact can be proven to be incorrect.

6. The appellant wishes to add at this time that the statement made by the Federal agents stating the appellant was in fact considered to be dangerous was only a statement made by them to justify this unreasonable and unlawful search and seizure is was and is in fact based on no facts or evidence to point to this kind of a statement, but the evidence in fact points to the opposite of this.

Sworn to and subscribed to before me
this 2 day of April 1974.

W Bastress
Notary Public

Parole Officer Authorized by Act of July 7, 1955, to administer oaths (18 U.S.C. 4041)

Frank D. Lovell
Francis David Lovell Pro-se
Appellant

TO BE PRESENTED TO THE
HONORABLE JUSTICE
WEINSTIEN ON THE DAY
OF MY SENTENCING:

73-cr-857

Your Honor I would like to address this court before you hand down sentencing concerning the actions of persons involved with this case previously stated:

1. Conflict on the part of Mr. Kaplin U.S. Attorney against the defendant. The defendant wishes this court to note within its records that on the date of Sept 17,1973 Mr. Kaplin did in fact state to the magistrate that the defendant was "scouring the country side robbing banks John Dillinger style". Because of this statement made by Mr. Kaplin the defendant feels an most unreasonable bail of $50.000 cash was imposed upon him. The defendant wishes to state that there was no evidence nor suspicions to back up this statement except for the fact that the defendant was reading a book titled the life story of John Dillinger at the time of his arrest, because of this book the defendant feels this label was placed upon him by Mr Kaplin, the defendant can feel the pressures of prejiduce within this case.

2. The defendant would like the court records to show.
That on the date of Jan 7,1974 the defendant was brought from the west street detention center to Mr. Kaplins office in the presence of one United States Marshal and two Federal agents one of whom being agent Holiday. At this time Mr. Kaplin demanded that I coroporate with him concerning a robbery in the state of Massachusetts, I stated that I knew nothing of any robbery but was living in ohio at the time and that I felt unjust means were in the process concerning this case. At that Mr. Kaplin jumped up from his desk and began yelling at the defendant stating that when I went up for sentencing he would talk with the judge on my case and make it rough on me at sentencing time. The defendant can feel the pressures of prejiduce on the part of Mr. Kaplin concerning this case.

3. The defendant would like the records to show that:
On the date of Jan 17,1974 two agents one of those being agent Hoilday came to the defendant at the West street Detention Center at this time agent Holiday stated defendant was to be indicted for an attempted escape at West street. I at that time wrote to the U.S.Attorney to see what the reasons were for me to be accused of such charges at this time I still have not recieved a reply. I am led to believe what agent Holiday said to me on that day was only ment to harras, confuse, and intimidate me. Again the defendant can feel the tensions of undue prejiduee setting in in this case.

4. The defendant would also like this court to record that:
On yet another date agent Holiday approached the defendant at West street at this time agent Holiday demanded that defendant supply him with a sample of his hair at that time the defendant suggested that agent Holiday secure

the legal steps necessary to obtain a sample of hair. At this time agent Holiday stated that if thedefendant made him go through the grand jury that he "agent Holiday" would rip the hair from the defendants head in patches. Again the defendantsis being threatened and can feel the pressures of undue prejiduce against him. The defendant would like to add at this time that this is the same agent who testified at the defendants trial as to the pat down of the defendant at the time of his arrest, The defendant wishes to add at this time that the agent did in fact lie under oath concerning this search of the defendant at the time of his arrest.

5. The defendant wishes to say to this court at this time that he feels his defense counsel in this case has in fact not done a sufficant job of preparing a defense for the defendant at this time, he has not kept the defendant informed as to the moves which have been made by himself, the U.S. Attorney, nor the Court it's self. The defendant in fact feels that he has been led down the path of justice blindfolded.

The defendant sincerly hopes at this time that the court will consider what I have just said and try to consider as it did not at the so-called trial that the defendant is in fact stating what is the truth. The defendant is and has in fact been subjected to undue harrassement both by the Federal agents and the U.S.Attorney involved within this case. And that the defendant feels from the begining Mr. Kaplin was trying a Mr. John Dillinger and not a Mr. Frank Lovell as indicated within the indictment.

The defendant wishes to thank the court for taking the time in which to hear this of which I have said and if the court cannot still believe, just try to consider the possiability of the defendant being treaten unjustly.

Thank You
Sincerly

Frank David Lovell

frank David Lovell Defendant

eds Arraign Dino Jr. on Gun Rap

Los Angeles, Jan. 18 (UPI) — Dean Martin's 22-year-old son, a collector of guns ce his youth, was arraigned in Federal Court today on charges in connection with the covery of five machine guns and a 20-mm anticraft cannon in his Beverly home.

he younger Martin, Dean Paul n Jr., known as Dino, was ased on his own recognizance er posting a $5,000 bond following a brief appearance before ited States Magistrate James Peene.

o further court appearances e set and Martin's attorney, rles Weedman, told reporters t he was hopeful a settlement ld be reached without charges g submitted to a grand jury possible indictment.

Martin was cited yesterday by nts of the Bureau of Alcohol, acco and Firearms, a division the Treasury Department. ents went to his home with a rch warrant after an undercer agent reported buying two omatic weapons for $625—an 16 rifle and an AK-47 rifle—m Martin on Wednesday.

ollowing the court appearance, edman said that Martin had n collecting guns since he was outh and that the weapons in home were part of a collec-

Weedman said that Martin had decided that he wanted to dispose of them by selling them.

Federal laws forbid the selling of machine guns without notifying the government and paying a tax.

Weedman said that the charges against Martin were "highly technical and he may have violated these regulations." He said that Martin was innocent of "any outright attempt to dispose of illegal firearms outside the law."

Asked whether he had approached the agents to sell the guns, Martin replied, "No, they approached me."

Weedman said that he would be talking soon with assistant U.S. Attorney Robert Perry and that he was hopeful a plea could be submitted that would be satisfactory to the government.

DAILY NEWS, SATURDAY, JANUARY 19, 1974

UPI Telephoto

Dean Martin Jr. (l.) talks with attorney Charles Weedman.

APPLICATION TO PROCEED IN

FORMA PAUPERIS

BEFORE ME, THE UNDERSIGNED AUTHORITY _____, WHO AFTER BEING DULY SWORN, SCCORDING TO LAW, ON OATH DEPOSES AND SAYS:

I) THAT HE IS A CITIZEN OF THE UNITED STATES, AND OF LEGAL AGE: AND,

2) THAT BECAUSE OF HIS POVERTY HE IS UNABLE TO PAY THE COSTS OF THE INSTANT CAUSE OF ACTION, OR TO GIVE SECURITY OF FOR THE SAME, AND,

3) THAT HE IS A PAUPER WITHIN THE MEANING OF THE LAW (ADKINS V. DUPONT, 335 U.S. 331): AND

4) THAT HE SEEKS REDRESS IN GOOD FAITH TO OBTAIN THE RELIEF TO WHICH HE VERILY BELIEVES HE IS ENTITLED.

WHEREFORE, IT IS RESPECTIVELY REQUESTED THAT THIS COURT GRANT LEAVE TO PROCEED HEREIN IN FORMA PAUPERIS FOR OTHERWISE AN INJUSTICE WILL OCCUR AND AFFIANT WILL BE FORECLOSED RELIEF BY REASON OF HIS INABILITY TO PAY THE COSTS THEREOF.

STATE OF Pa)
) ss
COUNTY OF Union)

Frank A Sewell
AFFIANT

SWORN TO AND SUBSCRIBED TO BEFORE ME
THIS 2 DAY OF April 1974

W Gaetres
NOTARY PUBLIC OR OTHER AUTHORIZED
OFFICIAL AUTHORIZED BY THE ACT OF
JULY 7th 1955 (18 U.S.C. 4004)

Parole Officer-Authorized by Act of July 7, 1955, to administer oaths (18 U.

CERTIFICATE OF SERVICE

AFFIDAVIT

Frank Smith, BEING DULY SWORN,
DESPOSES AND SAYS THAT HE HAS PLACED IN THE HANDS OF THE DULY AUTHORIZED
OFFICIAL AT THE Lewisburg Penn

THIS 2 DAY OF April 1974,

A COPY OF THE ATTACHED Motion of Appeal ,

TO BE SENT VIA UNITED STATES MAIL TO THE FOLLOWING PARTY OR PARTIES:

1. U.S. Court of Appeals
U.S. Court House
Foley Sq. New York

2. _____

3. _____

SWORN TO BEFORE ME THIS
2 DAY OF April
1974

[signature]

Parole Officer-Authorized by
Act of July 7, 1955, to admin-
ister oaths (18 U.S.C. 4004)